

UNITED STATES DISTRICT COURT  
FOR THE  
DISTRICT OF VERMONT

United States of America       :  
                                     :  
          v.                        :  
                                     :  
Richard Breault                 :

File No. 2:01-CR-88-01

MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION  
(Paper 40)

Defendant Richard Breault has moved to strike his sentence and for re-sentencing in light of the U.S. Supreme Court's ruling in Blakely v. Washington, 124 S. Ct. 2531 (2004). (Paper 40). The government has opposed the motion, arguing that Blakely, and the Supreme Court's extension of Blakely to the Federal Sentencing Guidelines in United States v. Booker, 125 S. Ct. 738 (2005), cannot be applied retroactively. Breault has consented to having his motion construed as a motion brought pursuant to 28 U.S.C. § 2255. (Paper 43). For the reasons set forth below, I agree with the government and recommend that Breault's § 2255 motion be DENIED.

Factual Background

On November 1, 2002, Breault pleaded guilty to one count of conspiracy to import more than 100 kilograms of marijuana into the United States. On January 30, 2003,

Breault was sentenced to 97 months in prison, to be followed by five years of supervised release. In reaching this sentence, the Court increased Breault's offense level under the Federal Sentencing Guidelines due to his leadership role in the conspiracy, and denied him credit for acceptance of responsibility.

Breault filed a direct appeal, but subsequently withdrew his appeal. Consequently, the Second Circuit dismissed Breault's appeal on April 9, 2003. Breault filed his instant motion on June 30, 2004, claiming that he is entitled to "a new sentencing hearing since the Court increased his sentence based on factors not found by a jury in violation of his constitutional rights. Blakely v. Washington, \_\_\_ U.S. \_\_\_ (2004)." (Paper 40).

#### Discussion

In Booker, the Supreme Court applied its prior holding in Blakely to the Federal Sentencing Guidelines, and held that the Guidelines "violated the Sixth Amendment to the extent that they allowed the maximum sentence authorized by a guilty plea or a verdict to be increased based on findings of fact (other than the fact of a prior conviction) made by the judge." Guzman v.

United States, 404 F.3d 139, 141 (2d Cir. 2005) (citing Booker, 125 S. Ct. at 755-56). The Second Circuit subsequently held that Booker does not apply retroactively to cases on collateral review that became final prior to the Booker decision. Id. at 144. Specifically, in Guzman, the Second Circuit determined that although Booker established a new rule of constitutional law, the rule was procedural rather than substantive. Id. at 141-42. Guzman further held that the rule announced in Booker did not establish a "watershed rule 'implicating the fundamental fairness and accuracy of the criminal proceedings,'" and thus could not be applied retroactively. Id. at 142-43 (quoting Schriro v. Summerlin, 124 S. Ct. 2519, 2523 (2004)).

Consequently, the law in this Circuit is that Booker is not retroactive, "i.e., it does not apply to cases on collateral review where the defendant's conviction was final as of January 12, 2005, the date that Booker was issued." Id. at 144. Similarly, courts in this Circuit have uniformly held that Blakely, which was decided in 2004, may not be applied retroactively. See Green v. United States, 397 F.3d 101, 103 (2d Cir.

2005) (“[N]either Booker nor Blakely apply retroactively to [petitioner's] collateral challenge” for purposes of second or successive motion); Carmona v. United States, 390 F.3d 200, 202 (2d Cir. 2004) (the Supreme Court has yet to make Blakely retroactive on collateral review); see also Steele v. United States, 2005 WL 704868, at \*16 n. 18 (S.D.N.Y. Mar. 29, 2005); Nnebe v. United States, 2005 WL 427534, at \*9 (S.D.N.Y. Feb. 22, 2005).

In this case, Breault's conviction and sentence became final in 2003, prior to the Supreme Court's issuance of the Booker and Blakely decisions. Because the law in this Circuit bars retroactive application of those decisions, Breault's sentence, calculated according to the Federal Sentencing Guidelines in effect at that time, cannot be changed. I therefore recommend that his § 2255 motion be DENIED.

#### Conclusion

For the reasons set forth above, I recommend that Breault's motion to strike sentence and for re-sentencing (Paper 40), construed as a motion filed pursuant to 28 U.S.C. § 2255, be DENIED.

Dated at Burlington, in the District of Vermont,  
this day 26<sup>th</sup> of May, 2005.

/s/ Jerome J. Niedermeier  
Jerome J. Niedermeier  
United States Magistrate Judge

Any party may object to this Report and Recommendation within 10 days after service by filing with the clerk of the court and serving on the magistrate judge and all parties, written objections which shall specifically identify the portions of the proposed findings, recommendations or report to which objection is made and the basis for such objections. Failure to file objections within the specified time waives the right to appeal the District Court's order. See Local Rules 72.1, 72.3, 73.1; 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b), 6(a) and 6(e).